IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-726

KENTUCKY LIQUID RECYCLING, INC., LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, DONALD EUGENE DISTLER, CHARLES W. HORN, JR., JOSEPH ALFRED HESS, JR.,
Petitioners,

-vs-

CITY OF EVANSVILLE, INDIANA CITY OF MT. VERNON, INDIANA, THE WATER WORKS DEPARTMENT OF THE WATER WORKS DISTRICT OF THE CITY OF EVANSVILLE, Individually and as representative for and on behalf of class similarly situated,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Respondents, City of Evansville, Indiana, City of Mt. Vernon, Indiana, The Water Works Department of the Water Works District of the City of Evansville, individually and as representative for and on behalf of class similarly situated, respectfully pray that this Court deny Petitioners' Petition for a Writ of Certiorari to review the judge-

ment of the United States Court of Appeals for the Seventh Circuit in *City of Evansville, Indiana, et al. v. Kentucky Liquid Recycling, Inc., et al.*, No. 78-1578, entered August 9, 1979, for the reason that there are no conflicts between the Circuit Courts of Appeals and for the further reason that the judgment of the Court of Appeals below is correct.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *City of Evansville, Indiana, et al. v. Kentucky Liquid Recycling, Inc., et al.*, 604 F.2d 1008 (7th Cir. 1979). (See also: Appendix B to Petitioners' brief, p. 7a). The opinion and judgment of the United States District Court for the Southern District of Indiana, entered March 7, 1978, and March 23, 1978, respectively, are not reported but are found in the Appendix to Petitioners' brief. (See Appendix A, p. 1a and 6a, respectively.)

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was rendered and entered on the 9th day of August, 1979. The Petition for Writ of Certiorari was filed by Petitioners on November 6, 1979, alleging jurisdiction under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Did the Amended Complaint filed by the Respondents in the District Court below, alleging, *inter alia*, a cause of action based upon federal common law of nuisance resulting from the alleged intentional dumping of highly

poisonous and carcinogenic chemicals, octaclorocyelopentene and hexachlorocyclopentadiene, state a claim for relief and provide the District Court with jurisdiction under the Federal Question Statute, 28 U.S.C. § 1331 (a)?

STATUTORY PROVISIONS INVOLVED

The Respondents alleged jurisdiction in the District Court below, *inter alia*, by virtue of the Federal Question Statute, 28 U.S.C. § 1331 (a) which provides:

> "The District Court shall have original jurisdiction of all civil action wherein the matter and controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

STATEMENT OF THE CASE

The Respondents, City of Evansville, Indiana, and City of Mt. Vernon, Indiana, are municipal corporations duly organized and existing under virtue of the laws of the State of Indiana. The Respondent, Water Works Department of the Water Works District of the City of Evansville, is a legal entity which operates and maintains the waterworks system of the waterworks district of the City of Evansville, Indiana, and is responsible for purification of water obtained from the Ohio River and for the distribution of said water to the residents of said district for consumption. The Respondent, City of Mt. Vernon, Indiana supplies purified water to the residents of Mt. Vernon, Posey County, Indiana.

At some time in March of 1977, the Petitioner, Kentucky Liquid Recycling, Inc., acting by and through its agents, servants and employees, and the Petitioners, Donald Eugene Distler, Charles W. Horn, Jr. and Joseph Alfred Hess,

Jr., caused the discharge of two highly toxic chemicals into the Petitioner, Louisville and Jefferson County Metropolitan Sewer District's system. That thereafter a portion of said highly toxic chemicals entered the Ohio River and subsequently entered the Respondents' water treatment facilities. As a further result of the entries of said highly toxic chemicals into the Louisville and Jefferson County Metropolitan Sewer System, the Petitioner, Louisville and Jefferson County Metropolitan Sewer District, commenced discharging untreated and/or adequately treated sewage, along with said poisons, into the Ohio River at its Louisville, Kentucky plant. As a result of the presence of said highly toxic chemicals, pollutants and sewage in the water of the Ohio River drawn by the Respondents for residential consumption, the Respondents incurred substantial costs in unusual and extraordinary treatment expenses to remove said contaminants.

On July 13, 1977, the Respondents filed in the District Court their complaint seeking compensatory and punitive damages. Said complaint was amended on September 20, 1977, alleging, *inter alia*, a claim for relief under the federal common law of nuisance and further alleging the District Court had jurisdiction of said claim for relief pursuant to the Federal Question Statute, 28 U.S.C. § 1331. On October 20, 1977, the Petitioner, Louisville and Jefferson County Metropolitan Sewer District filed its Motion to Dismiss Respondents' Amended Complaint pursuant to Rule 12 (b) (1), (2) and (3) of the Federal Rules of Civil Procedure. The issues were thereafter briefed and on March 7, 1978, the District Court found that it lacked subject matter jurisdiction and Respondents' Amended Complaint was dismissed as to all Petitioners.

Thereafter a timely appeal was taken to the United States Court of Appeals for the Seventh Circuit, which reversed, in part, the decision of the District Court below holding that the Respondents' Amended Complaint stated a claim for relief under federal common law nuisance and

that the District Court had jurisdiction pursuant to the Federal Question Statute, 28 U.S.C. § 1331.

REASONS FOR DENYING THE WRIT

A.

THERE IS ABSOLUTELY NO CONFLICT BETWEEN THE CIRCUIT COURT OF APPEALS AND THE RULING BELOW

The Petitioners attempt to invoke the jurisdiction of this Court for review on Writ of Certiorari alleging a conflict between the Circuit Courts of Appeals, and alleging that the Court of Appeals for the Seventh Circuit has decided a question of federal law which should be resolved by this Court. The gravaman of the Petitioners' assertion that the opinion below was erroneous is twofold:

1) That a municipality may not maintain an action based upon federal common law nuisance; and

2) That damages will not lie for a violation of federal common law nuisance.

The Petitioner's cases, cited as constituting a conflict between the various Court of Appeals, when analyzed within the context of the reasons they contend the decision below is incorrect, demonstrate that the perceived conflict between the Courts of Appeals is non-existent. The fallacy of the Petitioners' approach to the issues presented is that their cases cited to not conflict for any reason claimed as constituting an error in the decision below.

In support of Petitioners' argument that there is a conflict between the Circuits, their principle reliance is upon a District Court's decision in *Parsell v. Shell Oil Company*, 421 F. Supp. 1275 (D.C. Conn. 1976). That District Court's opinion was affirmed, *sub. nom*, by the Second Circuit in an unpublished opinion. *East End Yacht Club v. Shell Oil*

Company, 573 F. 2d 1289 (2nd Cir. 1977). However, the basis of the affirmance, the particular errors argued on appeal and the issues resolved in that appeal are unavailable and not cited by the Petitioners. This Court is asked to speculate that the affirmance was on the basis of the District Court's reasoning below. Because the decision in *Parsell* involved an intrastate pollution and non-governmental entities, the case is simply inapplicable and clearly distinguishable from the case at bar. At most, the Petitioners can only claim an alleged conflict between the District Court's opinion and the Seventh Circuit's opinion in the instant case and this would not be a basis for invoking the jurisdiction of this Court on a Writ of Certiorari.

The only other case cited by the Petitioners for a supposed conflict is *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F. 2d 1006, (4th Cir. 1976). The Petitioners rely upon *Train* for the proposition that a private party may not maintain an action based upon the theory of federal common law nuisance. However, in *Train*, the Court specifically stated:

> "It is not essential that one or more states be formal parties if the interest of the states are sufficiently implicated." *Id.* at 1009, f.n. 8.

In this case, the Respondents are not private parties but are governmental entities charged with providing clean and safe

drinking water to its citizens under state statute.[1] In fact, in *Parsell* the Court also noted the significance of the fact that there was no "governmental entities" involved. *Parsell v. Shell Oil Company*, 421 F. Supp. 1275, 1280 (D.C. Conn. 1976).

There is no question presented in *Train* whether an action for damages is maintainable under the theory of federal common law of nuisance since the plaintiff merely was seeking injunctive relief to abate the nuisance. In neither *Parsell* nor *Train* was there interstate pollution alleged, as in the instant case; both of those cases involved allegations of only intrastate pollution. In neither *Parsell* nor *Train* was there a governmental entity maintaining the suit; both cases involved private parties.

Even though the cases relied upon by the Petitioners involved private parties; even though the cases relied upon by the Petitioners involved intrastate, not interstate pollution, as alleged in this case; even though the Fourth Circuit specifically rejected the argument that a State is a necessary formal party to an action based upon federal common law nuisance; and even though the Petitioners can only speculate as to a supposed conflict with the Second Circuit; the Petitioners would have this Court believe that there is, somehow, a conflict between the various Courts of Appeals. The Petitioners own characterization of the Fourth Circuit's decision *i.e.*, "(T)he Fourth Circuit declined to extend the application

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1 The Indiana States statutes, I.C. 19-3-25-1, *et seq.*, provided for the creation and existence of the Respondent, The Water Works Department of the Water Works District of the City of Evansville. Acts 1927, Ch. 164, § 1, Repealed, Acts 1978, P.L. 2, § 1919 and Acts 1979, P.L. 160, § 1. In addition, I.C. 16-1-26-4 provides, in part, that no offering for public consumption shall be made of any drinking water which shows bacteriological or chemical content deleterious to public health. Acts 1949, Ch. 157, § 1753.

of the doctrine in a case involving *private plaintiffs* in an *intrastate* pollution controversy," (Petition p. 9), demonstrates that there is no conflict where there is a governmental entity maintaining the suit in an interstate pollution controversy and explains why Petitioners' cases are distinguishable upon their individual facts. (Emphasis added.)

B.

THE DECISION BELOW IS A NARROW HOLDING DECIDED CORRECTLY

Because the District Court dismissed the Respondents' Amended Complaint upon a Motion to Dismiss for lack of subject matter jurisdiction, the Petitioners admit the factual allegations of the Respondents' Amended Complaint.[2] Under said allegations the Respondents would prove at the trial of this cause that the Petitioners caused the discharge of two highly toxic chemicals, octaclorocyelopentene and hexachlorocyclopentadiene, known carcinogens, into the Ohio River, an interstate waterway. They would further admit that these poisons ultimately flowed down the Ohio River and caused Respondents, municipal corporations and water treatment facilities, extraordinary expenses in the purification of water for their customers in Evansville and Mt.

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[2]The law is well settled in ruling on a Motion to Dismiss the complaint is construed in the light most favorable to the plaintiff and its allegations of fact are taken as true, *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). Furthermore, the complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of their claim which would entitle them to relief, *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. 3d. 2d 80 (1957).

Vernon, Indiana.

This Court, when faced with a similar factual situation as Respondents' Amended Complaint, that is, interstate pollution, fashioned federal common law nuisance in *Illinois v. Milwaukee*, 406 U.S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972). The basic premise of this decision was stated by Mr. Justice Douglas, speaking for a unanimous Court, as follows:

> "It is not uncommon for Federal Courts to fashion federal law where federal rights are concerned . . . When we deal with air and water and their ambient or interstate aspects, there is a federal common law." *Id.* at 406 U.S. 91, 103.

Without this fundamental base there would effectively be insured a mishmash of state enforcement and litigation in protection of our interstate waterways. The Ohio River interstate waterway originates in Pennsylvania and forms the boundaries between Ohio and West Virginia, Ohio and Kentucky, Indiana and Kentucky, Illinois and Kentucky and flows into the Mississippi River. As the river forms the boundaries of and abbuts six different states during its course, the federal common law nuisance policy of providing a "uniform rule of decision" is as applicable in the instant case as it was in the *Illinois* decision. *Id.* at 105, f.n. 6. The injury complained herein originated in the Commonwealth of Kentucky and caused damage to interest of the State of Indiana.

The Petitioners first question whether a municipality may maintain an action based upon federal common law nuisance. Unlike the characterization by Petitioners of the opinion below, the Seventh Circuit Court of Appeals has not opened the way for private individuals to state a federal common law nuisance claims. The Respondents in this action are not private individuals but are municipal corporations, subdivisions of the State of Indiana and public cor-

porations required to expend public funds for the services they seek to provide the residents of their districts. Thus, the holding is quite a narrow extension, if indeed an extension at all, of *Illinois v. Milwaukee*.[3]

No decision cited by the Petitioners in any way contravenes the holding or logic of the Seventh Circuit below that a municipality has a right of action under federal common law nuisance. In the only other case deciding this specific issue, *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.C. N.J. 1978), the court specifically stated:

> "Defendants herein first argue that plaintiff cannot bring this action since it is not a state. It is agreed that the decision of *Illinois v. Milwaukee, supra*, should not be extended to encompice an action by a private person. In response to this contention, it should be noted that plaintiff is not a private person or entity but, rather, is a township." *Id*. at 1213.

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[3]The holding of this Court in *Illinois v. Milwaukee* was stated as: "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of §1331 (a). We hold that it does; . . ." *Id*. at 406 U.S. 91, 98-99. It should also be noted that this Court on the same day in deciding *Illinois v. Milwaukee*, also decided *Washington v. General Motors Corporation*, 406 U.S. 109, 92 S. Ct. 1396, 31 L. Ed. 2d 727 (1972) wherein it was stated: ". . . Moreover, citizens, states and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights." *Id*. at 406 U.S. 109, 115 f.n. 4.

Furthermore, in *Parsell v. Shell Oil Company*, 421 F. Supp 1275 (D.C. Conn. 1976), the Court spoke in terms of governmental entities. The Petitioners and the Respondents both include governmental entities. Therefore, the cases cited by the Petitioners involving private parties are clearly inapplicable to the situation at hand.

In addition, a number of courts have held that federal common law nuisance actions are available to another non-state plaintiff, the United States. See *United States v. Stoeco Homes, Inc.*, 498 F. 2d 597 (3rd Cir. 1974), cert. denied, 420 U.S. 927, 95 S. Ct. 1124, 43 L. Ed. 2d 397 (1975); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D.C. Vt. 1972), aff'd. 487 F.2d 1393 (2nd Cir. 1973). See also, *Stream Pollution Control Board of the State of Indiana v. United States Steel*, 512 F. 2d 1036 (7th Cir. 1975), wherein although not precisely passing upon whether a cause of action had been stated, the court stated:

> "While United States Steel argues that the application of this federal common law depends on the existence of a conflict between sovereigns, we note that, with one exception, the federal district courts have permitted the federal government to utilize this federal common law as a basis for pollution - abatement actions. *Id*. at 512 F.2d 1036, 1040, f.n. 9.

Purely and succinctly stated, the argument by the Petitioners on the advisability of allowing private parties to assert federal common law nuisance claims is inapplicable here. As stated in the Court of Appeals in the decision below:

> "Whatever the result should be when the plaintiff is a private party or when no interstate effects are alleged, there can be little doubt that the reasons the Supreme Court found

> compelling for declaring a federal common law of interstate water pollution are applicable here. The plaintiffs are municipal or public corporations, subdivisions of the state, that were required to spend public funds because of pollution of an interstate waterway by acts done in another state. The interests of the state in this interstate pollution dispute are implicated in the same way such interests were implicated in *Illinois v. Milwaukee.*" *City of Evansville, Indiana, v. Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008, 1018 (7th Cir. 1979).

The decision below merely implements the policy of *Illinois v. Milwaukee.* The distinction between a state plaintiff and a governmental unit plaintiff is simply non-existent and the Petitioners have failed to disclose any authority in support of such a distinction.

The second area which the Petitioners assert for granting the Writ of Certiorari is the alleged error of the Court of Appeals ruling below holding that the Respondents' prayer for damages is not inconsistent with a claim for relief under federal common law nuisance. The holding of the Court of Appeals below was a very narrow one. The Court stated that:

> "We hold only that a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution." *City of Evansville, Indiana, v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979).

This position has been accepted by the United States District Court for the Northern District of New York *In the Matter of Oswego Barge Corp.*, 439 F. Supp. 312 (D.C. N.Y. 1977).

The Seventh Circuit in deciding the instant case reasoned that this Court's decision in *Illinois v. Milwaukee* focused only upon the type of claim presented in that case, *i.e.* abatement. The Court noted:

> "We find nothing in the opinion *Illinois v. Milwaukee* that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential." *City of Evansville, Indiana, v. Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008, 1019, f.n. 32.

The Court then concluded:

> "Additional support for the conclusion we reach on this point may be found in the Supreme Court's references to the law of 'public nuisances.' *Illinois v. Milwaukee, supra,* 406 U.S. at 106, 107, 92 S. Ct. 1385; See also *Vermont v. New York,* 417 U.S. 270, 275 N.5, 94 S. Ct. 2248, 41 L. 3d. 2d 61 (1974). For in such suits plaintiffs found to meet the 'particular injury' requirements for maintaining a suit for public nuisance traditionally have been awarded damages or equitable relief depending on the circumstances. See generally, W. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966); W. Prosser, *Handbook of the Law of Torts,* 602-606 (4th Ed. 1971). 'Once the existence of a nuisance is established, the plaintiff normally has three possible remedies: an action for damages which he has suffered, equitable relief by injunction, and abatement by self help.' *Id.* at 602." *Id.* at 604 F. 2d 1008, 1019 f.n. 34.

In fact, the decision of *Illinois v. Milwaukee* spoke

specifically to this particular point noting:

> "Yet the remedies which Congress provides are not necessarily the only federal remedies available. It is not uncommon for federal courts to fashion federal law where rights are concerned." *Illinois v. Milwaukee,* 406 U.S. 91, 103.

To recognize an action based upon federal common law nuisance without recognizing a right of action for damages would be to apply a doctrine without any teeth in it. If the position of the Petitioners in applying a federal right of action to abate a nuisance with no remedy for damages is accepted, such a position would destroy the underlying basis in this Court's holding in *Illinois v. Milwaukee;* that is, to provide a uniform standard of conduct in which polluters must be held accountable and to provide governmental entities a remedy other than self help. If the only remedy available under federal common law nuisance was a remedy for abatement, an individual or corporation could easily create a nuisance and voluntarily abate the nuisance and leave the damaged parties without a remedy to recover damages caused by the nuisance. This Court recognized the remedies appropriate for a violation of a duty imposed under federal common law nuisance would necessarily depend upon the facts in a particular case. *Illinois v. Milwaukee,* 406 U.S. 91, 108, 92 S. Ct. 1385, 1395 (1972). The Respondents, whose duties it is to provide drinking water to its citizens, should have the right to recover its extraordinary expenses caused by the Petitioners' conduct as the Court of Appeals correctly held. If the rule were otherwise, a state could have substantial *portions of its terrain or its citizens* injured and left without a remedy. The pollution having ceased, what is their only remedy -- self help?

Lastly, it should be noted this Court recently held in *Davis v. Passman,* _____ U.S. _____ , 99 S. Ct. 2264,

_____L. Ed. 2d _____, (1979), that:

> ". . . the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Id.* at 2274.

In other words:

> ". . .(a) *cause of action* is a question of whether a particular plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the Court; and relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all . . ." *Id.* at 2274, f.n. 18.

Hence, the question of the appropriateness of the relief requested by the Respondents has no bearing upon their stating a valid cause of action based upon federal common law nuisance, and is, therefore, premature at this time as the decision below in the District Court was based upon a lack of subject matter jurisdiction.

CONCLUSION

Because the Petitioners have failed to demonstrate any conflict between the Circuit Courts of Appeals and the decision below and for the further reason that the United States Court of Appeals for the Seventh Circuit correctly reversed and remanded the instant action for trial in the District Court below, the Respondents herein respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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